GRATUITOUS UNDERTAKINGS.

THE ordinary division of personal actions between torts and contracts has long been regarded, in our law, as inadequate. Lately there has been a determined and probably successful attempt to revive the phrase *quasi-contract*, which was feebly put forward two centuries ago;[1] and the phrase *quasi-tort*, before, I think, unknown to the common law, has been somewhat affected. But about these phrases there is an air of strangeness; they are fantastic habits of a continental cut, which seem ill suited to the sturdy limbs of the Common Law. One cannot help feeling that they conceal some native principles of our law which should be recognized, and recognized under English names.

A contract is a right which A has (*in personam*) against B, because B has consented, for a consideration, or in some formal manner, to assume the correlative duty. A tort is a violation of a right which A has (*in rem*) against B, equally with all others, because society has decreed that the corresponding duty should be laid upon every member of it. Between these classes of rights exists a third; which, unlike a tort, depends upon some voluntary act by B, by which he undertakes a duty, and, unlike a contract, does not depend upon any promise of B, but only upon the mutual relations of A and B. In other words, B assumes a duty merely by voluntarily entering into a new relation towards A.

To create such a right and duty no consideration need be shown, since no contract is necessary. As a matter of fact, entrance into such a relationship is often the occasion of a contract, which may to some extent supersede the principles of the common law, and govern the rights and duties of the parties. Thus, in case of carriage, some of the rights of the parties are often secured by a contract, — the bill of lading. But even in these cases the terms of the contract seldom embrace the whole transaction. In order to avoid complications, however, I shall consider cases where the relationship is gratuitous, so that the principles of law cannot be modified by contract; but the same principles govern

[1] *E.g.*, by Lord Mansfield in Moses *v.* Macfarlane, 2 Burr. 1005.

all relationships, except so far as they are superseded by the express provisions of some contract. There is no technical name for these rights. In the old law, action for the breach of such a right was induced by an assumpsit, or, as it should be translated in such a case, *he undertook*.[1] Following this old use, which is by no means uncommon to-day, I shall call a right of this sort an undertaking. The subject naturally falls into two parts: first, is there such a third division of rights, distinct from rights *ex contractu* and rights *ex delicto?* second, what are the principles governing gratuitous undertakings?

I.

An undertaking is the entrance of two parties into such relationship as that one party, on account of the bare relationship unaided by any agreement, has a new duty to perform toward the other; he *undertakes* a new duty. The definition may be rendered clearer by some examples of gratuitous undertaking. A's sheep falls into the river; B, seeing it, undertakes to rescue it. Before the undertaking, B has no duty toward A in the matter; but as soon as he actually enters upon the task of rescue, he must perform it with proper diligence. Any negligence by which the sheep is injured would render him liable to A; so would a negligent abandonment of the rescue when it was almost certain to succeed. A falls senseless in the street; B, a passing physician, undertakes to cure him. B might have passed by and left A to his fate; but having undertaken the work, he is liable for any negligence, either of commission or of omission. C sends a message to A by the B telegraph company. If the company receives the message to transmit, it is liable to A for any damage caused by negligent transmission. C pays A's fare on the cars of the B railroad company; the company negligently allows a robber to steal A's pocketbook. The company is liable for its failure to guard A.

All these are cases where the relationship between the parties was voluntary; in none of them is there any contract, and in most of them the liability of B could not arise from any tort,

[1] "*Assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself." Holt, C. J., in Coggs *v.* Bernard, 2 Ld. Raym. 909, 919.

properly so called. One of the most important classes of undertakings, however, is bailments; and for a long time it was held that every bailment included a contract. There has lately been a determined effort to controvert that doctrine, which is certainly untenable with regard to gratuitous bailments, because there is no consideration to support a contract. It is urged that the giving up of the goods by the bailor is sufficient. But so far from being a detriment, this is usually a benefit to the bailor; it secures protection to the goods for the bailor, but gives the bailee no right to use for any purpose. Even the element of mutual assent is not necessary. B, for instance, finds A's pocket-book in the street, and takes it up for the benefit of the owner; it is absurd to say that B promises the unknown owner, in consideration of being allowed to pick it up, to find him out and return it in good condition, and that such a promise is agreed to by A. Yet that is the absurdity to which we are brought by the ordinary doctrine of bailment. It is clear that there is really no contract in the case, at least, of gratuitous bailment, but that the rights and liabilities of the parties are regulated merely by the bailee's undertaking to hold the property.

It is equally true that the violation of an undertaking is not a tort, properly so called. It is a careful and exact use of legal language to call an undertaking a consensual obligation; it is a burden into which the obligor must voluntarily enter. One has only to be born or to immigrate into a society, in order to undergo the duty of respecting the persons and property of his neighbors; but in order to be required to exercise the active care required of an undertaker, the obligor must "take the trust upon himself."

The distinction is recognized in the law of damages. Where goods in the possession of a carrier are destroyed by a stranger, the act of the latter is a tort, and the measure of the damages he must pay is the value of the goods at the time and place of destruction; the owner could collect only that amount, though the wrongdoer knew of the destination of the goods. But if instead of suing the stranger, the owner brought action against the carrier, the value would be taken at the time and place of delivery, whether the form of action was tort or contract. This must be on the ground that the carrier's obligation was there violated; but clearly there was no tort there committed, for the property never came there.

It seems, then, that in all such cases the liability of the party at fault is to be decided by certain principles of the common law, distinct from those governing liability in cases of tort or breach of contract, which should be grouped together into another division of personal rights, coördinate with torts and contracts. It is true that such a division of personal actions has never been explicitly recognized in our law. But before the present division of actions into torts and contracts, a somewhat similar state of affairs prevailed. There seems at one time to have been a threefold division of personal actions into (1) trespass, and trespass on the case; (2) case induced by *assumpsit;* (3) covenant.[1] Actions on the case induced by *assumpsit* included not only breaches of simple contracts, but also breaches of gratuitous undertakings,[2] which therefore in their origin are more nearly allied to simple contracts than to torts. When those actions in which the *assumpsit* was merely an inducement were differentiated from those in which it was the gist of the action, the former would properly have united with the old action of detinue, founded on bailment, to make up the grand division of undertakings; just as the latter united with actions of debt and covenant to form the grand division of contracts. Bailments, however, were after a struggle drawn off into the division of contracts; and the few other cases of undertaking then known, not being of sufficient importance to form a separate division, either followed bailments, or with other actions on the case sank back into the division of torts. This fact, singular as it is, may be accounted for by the well-known early neglect of all rights that did not concern tangible property. Injuries to intangible property might, it is true, be redressed after the statute of Westminster II. by an action on the case. But the recognition of such injuries was a gradual process; and before such as were in the nature of breaches of undertaking were recognized, the twofold division of actions was fully established. Thus the earliest sorts of undertaking recognized were those of a farrier,[3] surgeon,[4] innkeeper as to the *goods* of the guest,[5] carrier,[6] and bailee.[7] It is only recently that such

[1] 43 Ed. III. 33, pl. 38; 11 Hen. IV. 33.
[2] 2 H. IV. 3, pl. 9.
[3] 46 Ed. III. 19, pl. 19.
[4] 48 Ed. III. 6, pl. 11.
[5] 42 Ed. III. 11, 13; 42 Lib. Ass. 260, pl. 17.
[6] Y. B. 22 Ass. 94, pl. 41.
[7] 8 Ed. II. 275.

undertakings as those of telegraph companies[1] and passenger carriers,[2] which concern intangible rights, have been enforced apart from contract.

It is to be noticed at the outset that there are two classes of undertakers: private undertakers, who assume a duty *pro hac vice*, and public or "common" undertakers,[3] whose business it is to assume the duty. It might be said that the latter undertake a duty to all the world at the time they enter into their public calling; and that a breach of such a duty as that sounds rather in tort than in undertaking, if I may use the phrase. But this seeming duty to all the world is of limited application. Generally, it requires a special relationship to give rise to a right of action. A railroad company is under no different obligation as to the world at large from that of the private owner of a carriage who invites his friend to ride. There is only one exception to this statement; that of the public duty of an innkeeper, common carrier, and anciently a common farrier, to receive every applicant that can be served. But this duty differs entirely from the duty toward the customer after the relation between them is actually undertaken. It depends upon the so-called "custom of England," is grounded on public policy, and a breach of it does indeed sound only in tort.[4] If we except this duty, and the anomalous liability of a common carrier "as an insurer," the obligations of both public and private undertakers are governed by the same rules.

II.

From a practical point of view, the theory here advanced is an important aid in the exceedingly difficult and delicate matter of ascertaining the degree of care required of one who undertakes a duty. This matter has caused much difficulty. On the one hand, the mooted distinction between gross and ordinary negligence in cases of bailment is involved; on the other, the question, What

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[1] N. Y. & W. P. Tel. Co. *v.* Dryburg, 35 Pa. 298; *contra*, Playford *v.* U. K. Tel. Co., L. R. 4 Q. B. 706.

[2] Foulkes *v.* Met. Dist. Ry., 5 C. P. Div. 157; *contra*, Alton *v.* Midland Ry., 19 C. B. N. S. 213.

[3] The word "common," now restricted to carriers, was formerly applied to all who exercised a public profession: common innkeeper, 11 H. IV. 45; common surgeon or farrier, 19 H. VI. 49; common hoyman, 2 Ld. Raym. 909, 918; common hackney-coachman, 2 Show. 127.

[4] Jackson *v.* Rogers, 2 Show. 327; Heirn *v.* McCaughan, 32 Miss. 17.

is negligence in an agent? We are assisted in at least two important ways: first, light is obtained by comparing cases arising out of bailment with those arising out of agency, now not usually brought together; secondly, a new test, easier of application, — What did he undertake to do? — is substituted for the old one, What was the degree of the defendant's negligence?

The proposition that I shall consider by this method is this: that the degree of care required of an undertaker is not proportionate to the reward, and therefore that the fact that the duty was undertaken gratuitously is immaterial, except as *evidence* of the extent of care undertaken. This, as I shall try to show, is the general result of the authorities, though there has been no explicit decision to that effect. And the proposition necessarily follows from the nature of an undertaking. No consideration is required, only entrance on the undertaking; and the compensation received is only one of a number of facts bearing on the question, What was the duty undertaken?

The leading case on the subject of gratuitous undertakings is Coggs *v.* Bernard,[1] in which the declaration alleged an undertaking to carry, but contained no allegation of a reward. The case was argued on a motion for arrest of judgment. The degree of care required of a gratuitous bailee was not in question, because the verdict was found on a count alleging that the defendant *assumpsisset . . . salvo et secure deponere.* The several opinions, however, show that the lack of consideration was not of itself regarded as affecting the degree of care. Gould, J., said that in case of a mere voluntary undertaking the defendant was liable only for gross neglect; but if he undertook expressly to do the act safely, he would be liable. "When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms. Holt, C. J., said in like manner, "There is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him." Of these *dicta* it may be said, first, that they allege the true reason for liability, namely, that he is to be held to such degree of care as he has undertaken

[1] 2 Ld. Raym. 909 (2 Ann.).

to give; secondly, though they conceive that the degree of care undertaken by a gratuitous bailee is *prima facie* only the slightest, yet in any case it may be shown that greater care was in fact undertaken. The rule, in short, was introduced with a view of helping the jury deal with a question of fact, namely, What was the degree of care undertaken; a worthy object, which seems not to have been attained.

Powell, J., in his careful and acute opinion, did not consider the degree of care to be bestowed; but it necessarily follows from his argument that the degree of care is not proportionate to the reward.

"It is objected that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action."

The opinion of Lord Holt has been followed in the modern treatises on bailments, and the cases constantly repeat his distinctions between gratuitous bailments, requiring ordinary or slight care, and bailments for hire.[1] The distinction has been severely criticised, as is well known; and it is doubtful if it is required to support the decision of many reported cases.

Nominally, however, the rule is established that a gratuitous bailee or other undertaker is liable only for gross negligence; and it has been the constant though unconscious effort of the courts so to apply this rule as to make it conform to the true principle of undertakings. And some subordinate rules have been adopted which go far toward reconciling the rule with true principle.

1. A gratuitous undertaker is bound to take only such care as

[1] Though in pleading, an allegation of negligence, simply, is enough: i. e., *gross* negligence is a matter of evidence.

he takes in his own affairs; "for the keeping them [goods bailed] as he keeps his own is an argument of his honesty."[1] "For although that [the care bestowed in his own case] may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns."[2] In this crude form the rule is objectionable, and is hardly law to-day. But there is a good test which is quite similar. The care taken by the defendant of his own goods in the particular event is no evidence at all of the care undertaken; but the care known to be taken by him of his own affairs prior to the undertaking is strong evidence of the care undertaken; for he would be expected to attend to the business of others no more carefully than to his own. In this form, the rule is unobjectionable, and would doubtless be followed; and it seems to be what was really in the mind of Lord Holt and of Chief Justice Parker in the opinions I have quoted.

2. Even a gratuitous undertaker is bound to use what skill he has.[3] Any negligence in an undertaker is gross, if from the nature of his business or from his special knowledge he knew that loss might ensue; for an undertaker must do the best he can. This carries Lord Holt's *dictum* so far that it coincides with the true rule in all the large class of cases covered by it. Thus in Shiells *v.* Blackburne,[4] where the defendant gratuitously undertook to enter goods in the Custom House for the plaintiff, but did it so negligently that they were lost, Lord Loughborough, C. J., said: —

"If in this case a ship-broker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but where an application, under the circumstances of the case, is made to a general merchant to make an entry at the Custom House, such a mistake as this is not to be imputed to him as gross negligence."

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[1] Holt, C. J., in Coggs *v.* Bernard.

[2] Parker, C. J., in Foster *v.* Essex Bank, 17 Mass. 479, 499.

[3] Wilson *v.* Brett, 11 M. & W. 113.

[4] 1 H. Bl. 158.

3. One undertaking a hazardous affair must take all reasonable steps to secure its successful accomplishment; the omission of any such step is gross negligence. An example of such an undertaking is the carriage of passengers. In the leading case of this sort, Philadelphia & Reading R. R. *v.* Derby,[1] Grier, J., said: "A distinction has been taken, in some cases, between simple negligence and great or gross negligence; and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" This is only a *dictum* like (Lord Holt's original statement of the doctrine of "gross negligence"); but it seems to represent current judicial opinion. It would cover all cases where one undertakes to do an act that requires a skill he does not possess. If, for instance, A, being a blacksmith, finds and takes up B's watch and attempts to repair it, he would doubtless be held to answer for the damage.

4. Where the gratuitous undertaker does an act which is contrary to the undertaking, he acts at his peril, though he uses due care. In a case in Massachusetts, A delivered a bond to B to be kept for him gratuitously. After a year B sent the bond by mail to A's wife, and it was lost. The majority of the court held B liable, without regard to negligence. "The complaint against him is not that he kept it negligently, or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission, in the case of valuable papers of such a description, or not. The question of due diligence or gross neglect, in our opinion, is not raised by the bill of exceptions. . . . He subjected the plaintiff to a risk which he had not con-

[1] 14 How. 468, 485. See *acc.* Siegrist *v.* Arnot, 10 Mo. App. 197.

templated, and did an act not authorized by the terms of his trust."[1]

These various rules seem to neutralize the effect of Lord Holt's *dictum*. Though the courts still say that a gratuitous undertaker is liable only for gross neglect, they really, by so doing, only postpone for a moment a decision as to the duty which was undertaken. For when called upon to interpret the term "gross neglect," they hold the gratuitous undertaker to be guilty of gross neglect if he falls below the standard of care and exertion required by his undertaking; thus finally applying the same test which is adopted in the case of undertakings for hire. The Supreme Court of Tennessee correctly states the present condition of the law as follows: "This general principle that a mandatory is only liable for gross neglect implies strict fidelity on his part, and the exercise of such care and prudence as, with reference to the particular subject of the bailment and the circumstances of the particular case, may be requisite for the performance of his undertaking."[2]

While thus showing that the degree of care required of a gratuitous undertaker does not differ from that required of an undertaker for hire, I have at the same time considered certain rules which are in use for determining the degree of care required in certain cases. This branch of the subject might be carried to great length, but enough has perhaps been said to indicate the method that might be adopted, and, I hope, to show the advantages of that method. In brief, the rule applicable in all cases of agency, bailment, or other undertaking, whether gratuitous or not, is this: The undertaker is held to such a degree of care and exertion in the business as in fact he undertook to bestow.

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[1] Ames, J., in Jenkins *v.* Bacon, 111 Mass. 373, 378. See to the same effect Colyar *v.* Taylor, 1 Cold. 372.

[2] McKinney, J., in Colyar *v.* Taylor, 1 Cold. 372, 379.